No. 20-1037

IN THE SUPREME COURT OF IOWA

THE ESTATE OF SUSAN FARRELL, by its administrator, Jesse Farrell, and as Representative for the claims of JESSE FARRELL, individually, JESSE FARRELL, as next friend of R. F., a minor, PEGGY MASCHKE, individually, and STEPHEN MICHALSKI, individually,

Plaintiffs,

v.

STATE OF IOWA; CITY OF WAUKEE; CITY OF WEST DES MOINES, IOWA; PETERSON CONTRACTORS, INC.; ROADSAFE TRAFFIC SYSTEMS, INC.; VOLTMER ELECTRIC, INC.; PAR ELECTRICAL CONTRACTORS, INC., MIDAMERICAN ENERGY COMPANY; and, KIRKHAM, MICHAEL & ASSOCIATES, INC.,

Defendants.

Appeal from the Polk County District Court, District Court No. LACL140694, the Honorable Judge Heather Lauber, presiding.

SUPPLEMENTAL REPLY BRIEF
CITY OF WEST DES MOINES, CITY OF WAUKEE, AND STATE OF IOWA

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THE RATIONALE OF *FULPS V. CITY OF URBANDALE* CONFIRMS THAT THE PUBLIC-DUTY DOCTRINE BARS PLAINTIFFS' CLAIMS AGAINST THE GOVERNMENTAL PARTIES

The recent opinion in *Fulps v. City of Urbandale* builds upon prior public-duty doctrine cases and helps to establish the rationale why the doctrine is applicable in this case. Plaintiffs' Supplemental Brief tries to align this case with the facts of *Fulps* and, in so doing, (A) neglects to mention important well-pleaded facts that require the application of the public-duty doctrine to the Governmental Parties. The *Fulps* decision shows that (B) the instrumentality of harm is an important factor in assessing whether the public-duty doctrine applies – and helps to show why the doctrine bars Plaintiffs' claims against the Governmental Parties. *Fulps* also stands as yet another case in which (C) the majority of the Court has analyzed the doctrine as being coexistive with the Iowa and Municipal Tort Claims Acts despite the concurring opinion to the contrary.

A. Plaintiffs' Supplemental Brief fails to present important well-pleaded facts that require the application of the public-duty doctrine.

Important well-pleaded facts contained in Plaintiffs' Petition are notably absent from Plaintiffs' Supplemental Brief. In their Supplemental Brief, Plaintiffs argue that the public-duty doctrine is

inapplicable because, like *Fulps v. City of Urbandale*, both cases involve pathways (sidewalk and interchange) built and maintained by governmental parties. (Plaintiffs' Supplemental Brief, pp. 8-14). In this regard, Plaintiffs present only part of the story.

The well-pleaded facts in Plaintiffs' Petition contain dispositive allegations that require the application of the public-duty doctrine. (First Amended Petition, paras. 46-48). On March 26, 2016, Mr. Beary made an incorrect turn on the Grand Prairie Parkway Interchange and traveled in a Westerly direction in the Eastbound lanes of Interstate 80 and head-on into a vehicle in which Des Moines Police Officer, Susan Farrell, was a passenger. (First Amended Petition, paras. 46-48).

Plaintiffs' Supplemental Brief tangentially mentions Mr. Beary one time, but only in an effort to reframe his role and try to escape the impact of the public-duty doctrine. (Plaintiffs' Supplemental Brief, p. 13). In this way, Plaintiffs emphasize only the allegations in their Petition that more closely conform this case with facts of *Fulps v. City of Urbandale*. *See Fulps v. City of Urbandale*, 2021 WL 1044414, * 1 (Iowa 2021) (instrumentality of harm to the *Fulps* plaintiff was the city's own sidewalk upon which plaintiff tripped and fell).

Plaintiffs' view of the well-pleaded facts would read out pertinent circumstances that make this case different from *Fulps* and, if accepted by this Court, require a review of the District Court's ruling on the Governmental Parties' Motion for Judgment on the Pleadings in a manner inconsistent with the proper standard of review. *See Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 633 (Iowa 2002) (judgment on the pleadings based on uncontroverted facts stated in the pleadings), *Stanton v. Des Moines*, 420 N.W.2d 480, 482 (Iowa 1988) (judgment on the pleadings, like a motion to dismiss, accepts as true the petition's well-pleaded factual allegations), *Hurd v. Odgaard*, 297 N.W.2d 355, 356 (Iowa 1980) (judgment on the pleadings assessed solely on the pleadings alone) , *and, Griffioen v. Cedar Rapids & Iowa City. Ry. Co.*, 914 N.W.2d 273, 280 (Iowa 2018) (appellate review for errors of law). Utilizing the proper standard of review[1], this Court must determine whether the District Court made an error of law when accepting as true the uncontroverted allegation that Mr. Beary collided

[1] Plaintiffs also improperly encourage the Court to consider matters outside the pleadings by suggesting that the Governmental Parties have indemnification protections by virtue of construction contracts. (Plaintiffs' Supplemental Brief, p. 14, fn. 3). Consideration of Plaintiffs' supposition in this regard would be improper under the standard of review because these facts are not contained within the pleadings.

his vehicle head-on with the vehicle in which Officer Farrell was a passenger traveling on Interstate 80. *See id.*

Taken together, Plaintiffs' allegations in their First Amended Petition claim that the Governmental Parties allegedly failed to protect one member of the general traveling public (Officer Farrell) from another member of the general traveling public (Mr. Beary) by failing to have basic safety features (road markings, lighting, and signage) completed before opening the Grand Prairie Parkway Interchange and failing to comply with the state-of-the-art engineering safety standards, criteria, and design. (First Amended Petition, paras. 35, 36, 42, 43, 46-48). Based on the allegations in Plaintiffs' First Amended Petition, the public-duty doctrine precludes Plaintiffs from establishing that the Governmental Parties owed a duty to Officer Farrell beyond what is owed to the public in general. *See Johnson v. Humboldt County*, 913 N.W.2d 256, 259-267 (Iowa 2018) (negligence, premises liability, and public nuisance claims for users of a public road barred by the public-duty doctrine).

In short, the well-pleaded allegations in Plaintiffs' First Amended Petition allege a failure of the Governmental Parties to protect Officer Farrell, a member of the general traveling public, from somebody else's

instrumentality of harm (Mr. Beary). *See Breese v. City of Burlington*, 945 N.W.2d 12, 18 (Iowa 2020) (citing *Johnson*, 913 N.W.2d at 261, *Estate of McFarlin v. State*, 881 N.W.2d 51, 63 (Iowa 2016), *Raas v.* 799 N.W.2d 444, 446 (Iowa 2007), *Kolbe v. State*, 625 N.W.2d 721, 724-25 (Iowa 2001), *Sankey v. Richenberger*, 456 N.W. 206, 208-209 (Iowa 1990). This is the classic case where the public-duty doctrine applies and acknowledged as such by *Fulps*. *See Fulps*, 2021 WL 1044414 at *5. "The public-duty doctrine is properly understood as a limit on suing a governmental entity for not protecting the public from harm caused by the activities of a third party." *Id.*

Plaintiffs' efforts to read out Mr. Beary as the instrumentality of harm should be rejected. Plaintiffs argue in their Supplemental Brief that Plaintiffs' "claims against the Governmental [Parties] are not based on allegations that they failed to protect [Officer] Farrell from [Mr.] Beary." (Plaintiffs' Supplemental Brief, p. 13). However, as argued above, the well-pleaded allegations in Plaintiffs' First Amended Petition contradict this argument. (First Amended Petition, paras. 46-48).

Contrary to Plaintiffs' argument, this case is not "on all fours" with *Fulps*. (Plaintiffs' Supplemental Brief, p. 14). In contrast to *Fulps*

(and *Breese),* Officer Farrell was not injured by a governmental pathway. *Cf. Fulps*, 2021 WL 1044414 at *1, *and*, *Breese*, 945 N.W.2d at 15. The *Fulps* plaintiff was injured by the municipal sidewalk. *See Fulps*, 2021 WL 1044414 at *1. The *Breese* plaintiff was injured by the municipality's sewer box. *See Breese*, 945 N.W.2d at 15. The instrumentality of harm in *Fulps* and *Breese* was the government's pathway. *See id.*, *and, Fulps*, 2021 WL 1044414 at *1. Here, in comparison, the well-pleaded facts undisputedly show that Officer Farrell was harmed by a third-party, Mr. Beary. (First Amended Petition, paras. 46-48). As such, the public-duty doctrine should be applied to limit Plaintiffs' ability to sue the Governmental Parties for not protecting Officer Farrell (a general member of the traveling public) from harm caused by the activities of Mr. Beary (a third-party). *See Fulps*, 2021 WL 1044414 at *5.

B. The instrumentality of harm is an important factor in assessing whether the public-duty doctrine applies.

Fulps made clear that the instrumentality of harm plays a vital role in determining whether the public-duty doctrine applies. *See Fulps*, 2021 WL 1044414 at *5. Nevertheless, Plaintiffs take issue with the Court's focus on the instrumentality of harm when assessing the public-duty doctrine – suggesting the instrumentality of harm is the

Governmental Parties' creation. (Plaintiffs' Supplemental Brief, pp. 14-16).

Plaintiffs endeavor to show, by hypothetical example, how the instrumentality of harm would lead to absurd results. (Plaintiffs' Supplemental Brief, p. 15). Plaintiffs suggest, in this regard, that if the plaintiff in *Fulps* tripped on an uneven sidewalk and fell onto a toddler's tricycle that the instrumentality of harm would have been the tricycle and the claims of the *Fulps* plaintiff barred by the public-duty doctrine. (Plaintiffs' Supplemental Brief, p. 15). Plaintiffs' hypothetical is fallacious. The insertion of the toddler's tricycle would affect a proper public-duty doctrine analysis in no meaningful way. Plaintiffs may have well substituted the law of gravity for the tricycle with no meaningful difference.

A better hypothetical based on the allegations in *Fulps* can be imagined, however. For example, if a general member of the traveling public was highly intoxicated, walking along a municipal sidewalk alleged to be defective, tripped and fell on a toddler riding a tricycle, and harmed the toddler; the toddler's claims against the municipality would be barred by the public-duty doctrine. Under the rationale of *Breese, Estate of McFarlin, Johnson, Kolbe, Raas, and Sankey*, the

public-duty doctrine, properly understood, acts as a limit on claims against governmental entities "for not protecting the public from harm caused by the activities of a third party." *See Fulps*, 2021 WL 1044414 at *5, *accord, Breese,* 945 N.W.2d at 19-20, *Johnson*, 913 N.W.2d at 266-267, *Estate of McFarlin,* 881 N.W.2d at 60, *Raas,* 729 N.W.2d at 449, *Kolbe*, 625 N.W.2d at 726, *and, Sankey,* 456 N.W.2d at 208.

By utilizing the instrumentality of harm in assessing the applicability of the public-duty doctrine, contrary to Plaintiffs' argument, it constrains the scope of the doctrine. (Plaintiffs' Supplemental Brief, p. 15). Thus, the public-duty doctrine has been held not to apply when the government is the instrumentality of harm – a sidewalk that harmed the plaintiff in *Fulps* or the sewer box that harmed the plaintiff in *Breese*. *See id.* at *6, *and, Breese*, 945 N.W.2d at 19-20.

The instrumentality of harm does not "wrest causation decisions" from the jury as argued by Plaintiffs. (Plaintiffs' Supplemental Brief, p. 15). As a no-duty determination, the public-duty doctrine is a purely legal question that should be based on articulated policies or principles and cannot "depend on foreseeability of harm based on the specific facts of a case." *See* Restatement (Third)

of Torts: Liability for Physical and Emotional Harm, § 7 cmt. i., *Thompson v. Kaczinski*, 774 N.W.2d 829, 835 (Iowa 2009), *and Johnson,* 913 N.W.2d at 265. By suggesting that the instrumentality of harm improperly takes away the causation determination from the jury, Plaintiffs improperly interject the concept of foreseeability into the public-duty doctrine analysis. *See id.*

The well-pleaded facts establish that Mr. Beary (a third-party member of the general traveling public) ran into the vehicle in which Officer Farrell (another member of the traveling public) was a passenger on Interstate 80. (First Amended Petition, paras. 46-48). Only by interjecting the concept of foreseeability can Plaintiffs' link the collision on Interstate 80 with alleged deficiencies in roadway markings, signage, and lighting on the Grand Prairie Parkway Interchange. (Plaintiffs' First Amended Petition, paras. 36, 51, 52, 70, 71, 79). Plaintiffs' argument in this regard must be that it was foreseeable that the alleged condition of Grand Prairie Parkway Interchange could permit a general user of the road to make a wrong turn and cause a collision with another member of the general traveling public. In other words, Plaintiffs advocate for the use of foreseeability

in the analysis of public-duty doctrine. That is not permissible under Iowa law. *See id.*

> The drafters [of the Restatement] acknowledge that courts have frequently used foreseeability in no-duty determinations, but have now explicitly disapproved the practice in the Restatement (Third) and limited no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder. We find the drafters' clarification of the duty analysis in the Restatement (Third) compelling, and we now, therefore, adopt it.

Thompson, 774 N.W.2d at 835. As a no-duty determination, the public-duty doctrine must be based on an "articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling." *Id.* That, in part, is accomplished by assessing the instrumentality of harm in public-duty doctrine cases. *See id.* The *Fulps* opinion follows in kind with *Thompson* and the Restatement (Third) by assessing the instrumentality of harm and finding that the plaintiff fell and was injured by the city's sidewalk, in comparison to being harmed by a third-party. *See Fulps,* 2021 WL 1044414 at *1, *5.

C. The public-duty doctrine is a no-duty determination applicable to public and private parties; it is coexistive with the Iowa and Municipal Tort Claims Acts; Plaintiffs are wrong to equivocate the doctrine with immunity.

In their Supplemental Brief, Plaintiffs utilize the concurring opinion in *Fulps* as an opportunity to file a surreply advocating for the abandonment of Iowa's public-duty doctrine in light of the Iowa and Municipal Tort Claims Acts. (Plaintiffs' Supplemental Brief, pp. 16-17). When responding to Plaintiffs' first bite at the apple in this regard, the Governmental Parties set out why the public-duty doctrine is coexistive with the Tort Claims Acts and should not be eliminated. (Governmental Parties Final Reply Brief, pp. 12-31). The reasoning set out by the Governmental Parties in their Final Reply Brief applies in response to Plaintiffs' call to adopt the *Fulps* concurrence. The *Fulps* concurrence does nothing to advance the argument for abandonment of the public-duty doctrine. However, the reasons to reject Plaintiffs' call to abandon the public-duty doctrine are summarized below so as not to simply incorporate those arguments by reference.

The Iowa Supreme Court has previously considered and repeatedly rejected arguments that the public-duty doctrine was an immunity abolished by the Iowa and Municipal Tort Claims Acts. *See, e.g., Breese,* 945 N.W.2d at 18; *Johnson*, 913 N.W.2d at 264; *Estate of*

McFarlin, 881 N.W.2d at 59; *Raas,* 729 N.W.2d at 448; *and, Kolbe*, 625 N.W.2d at 729-30 (all holding that the public-duty doctrine is coexistent with the Iowa and Municipal Tort Claims Acts). The Iowa and Municipal Tort Claims Acts only abrogated the historical governmental sovereign immunity. *See Johnson*, 913 N.W.2d at 264 (citing *Kolbe*, 625 N.W.2d at 725), *Thomas*, 838 N.W.2d at 521, (explaining the Iowa and Municipal Tort Claims Acts abolished governmental immunity); *accord, Wilson v. Nepstad*, 282 N.W.2d 664, 671 (Iowa 1979) (noting abrogation of governmental immunity by the Municipal Tort Claims Act), *and, Graham v. Worthington*, 146 N.W.2d 626, 630 (Iowa 1966) (prior to the Iowa Tort Claims Act, the doctrine of governmental immunity was applicable to the State and all of its political subdivisions).

Plaintiffs, by and through their advocacy of the *Fulps* concurrence, rely on infirm case law inconsistent with the Iowa and Municipal Tort Claims Acts. This Court should make clear what it has already held – that *Adam* and *Wilson* are overruled to the extent they hold that the Iowa and Municipal Tort Claims Acts abolished the public-duty doctrine. *See, e.g., Breese,* 945 N.W.2d at 18; *Johnson*, 913 N.W.2d at 264; *Estate of McFarlin*, 881 N.W.2d at 59; *Raas,* 729

N.W.2d at 448; *and, Kolbe*, 625 N.W.2d at 729-30 (en banc) (all holding that the public-duty doctrine is coexistent with the Iowa and Municipal Tort Claims Acts).

The Iowa and Municipal Tort Claims Acts are designed to put government on a more equal footing with private parties. *Adam v. State*, 380 N.W.2d 716, 724 (Iowa 1986) (citing *Wilson*, 282 N.W.2d at 558 (other citations omitted); *accord, Rome v. Jordan*, 426 S.E.2d 861, 862 (Georgia 1993) (dispensing with the notion that Georgia's waiver of sovereign immunity waived the public-duty doctrine). Governmental entities are to be held liable to the same extent as a private individual under like circumstances. *Adam*, 380 N.W.2d at 724 (citing *Wilson*, 282 N.W.2d at 558) (other citations omitted). The Iowa Supreme Court opinions "have been consistent with the principle that public employees share the same – but not greater – liability to injured parties as other defendants under like circumstances." *See Kolbe*, 625 N.W.2d at 729 (other citations omitted), *also see, Rome*, 426 S.E.2d at 862-63. In other words, decreasing immunity by way of the tort claims act could not increase duty. *See* R. Perry Sentell, Jr., *Special Contributions: Georgia's Public Duty Doctrine: The Supreme Court Held Hostage,* 51 Mercer L. Rev. 73, 77 (Fall 1999); *accord, Kolbe*, 625

N.W.2d at 729 (governmental and private parties share the same liability to injured parties under like circumstances).

Plaintiffs' argument for abandoning the public-duty doctrine is a call for sweeping change in Iowa tort law with far reaching implications requiring the Court to narrow the application of *Thompson v. Kaczinski* and Restatement (Third) of Torts: *Liability for Physical and Emotional Harm*, § 7 to private parties and except governmental entities from the general tort law. Plaintiffs' argument for adoption of the *Fulps* concurrence is inconsistent with the purpose of the Iowa and Municipal Tort Claims Acts calling for parity between governmental and private parties. Plaintiffs' argument should be rejected. If the Court accepted Plaintiffs' proposal, then the Governmental Parties would not be on equal footing with private parties under similar circumstances. To maintain equal footing between governmental and private parties under the Iowa and Municipal Tort Claims Act, the Governmental Parties are entitled to the full scope of Iowa's common-law tort doctrine.

Private parties are entitled to no-duty determinations. *See e.g., Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 376 (Iowa 2014) (making a no-duty determination for brand manufacturers to consumers of generic

medications); *Patterson v. Rank*, 2010 Iowa App. LEXIS 1565, *11-14 (Iowa Ct. App. December 22, 2010) (Iowa Case Number 10-0566) (making a no-duty for landlords to third-parties who are bit by a tenant's dog); *and, Van Fossen v. MidAmerica Energy Co.*, 777 N.W.2d 689, 696-699 (Iowa 2009) (making a no-duty determination for employers of independent contractors to household member of an independent contractor). Just as private parties are entitled to no-duty determinations, so too are the Governmental Parties. The public-duty doctrine serves this role and must be upheld to co-exist with the Iowa and Municipal Tort Claims Acts.

"Unlike immunity, which protects a municipality from liability for breach of an otherwise enforceable duty to the plaintiff, the public duty rule asks whether there was any enforceable duty to the plaintiff in the first instance." *See Johnson,* 913 N.W.2d at 264 (citing *Estate of McFarlin*, 881 N.W.2d at 59, and *Raas*, 729 N.W.2d at 448). "Because the public duty rule is not technically grounded in government immunity, the Iowa Municipal Tort Claims Act and the public-duty doctrine may coexist without conflict." *Id.* (citing *Raas*, 729 N.W.2d at 448, and quoting 18 Eugene McQuillin, *McQuillin on Municipal*

Corporations, § 53.04.25 (3d ed. 2006) (internal punctuation omitted).

CONCLUSION

This Court should overrule the District Court and enter judgment on the pleadings in favor of the Governmental Parties applying the public-duty doctrine. The recent decision in *Fulps* continues the common-law development of the public-duty doctrine to better articulate its applicability. *Fulps* confirms that the public-duty doctrine applies in situations such as the one before the Court in this appeal – where the context behind the Plaintiffs' allegations of wrongdoing is the Governmental Parties' failure to take positive action for the protection of Officer Farrell from Mr. Beary's instrumentality of harm. *See Fulps*, 2021 Iowa Sup. LEXIS 29, at *15-16, 2021 WL 1044414, at *6, *Breese*, 945 N.W.2d at 19-20 (citations omitted) *and, see Estate of McFarlin*, 881 N.W.2d at 58-64 (applying the public-duty doctrine to common-law duties). The case parallels the circumstances in *Johnson, Estate of McFarlin, Raas, Kolbe, and Sankey*, where the governmental entities allegedly failed to protect the plaintiff from harm caused by another. *See Johnson*, 913 N.W.2d at 266-267, *Estate*

of McFarlin, 881 N.W.2d at 60, *Raas,* 729 N.W.2d at 449, *Kolbe*, 625 N.W.2d at 726, *and, Sankey,* 456 N.W.2d at 208.

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The actual cost of printing or duplicating this brief is $0.00 per document.

/s/ Robert Livingston Dated: May 7, 2021

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on May 7, 2021, the foregoing Supplemental Reply Brief by the City of West Des Moines, City of Waukee, and State of Iowa was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system, service being made by EDMS upon the following:

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/s/ Robert Livingston Dated: May 7, 2021